APPEAL NO. 021971
FILED SEPTEMBER 5, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 8, 2002. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on February 7, 2000, with a 0% impairment rating (IR) pursuant to the Texas Workers' Compensation Commission (Commission)-appointed designated doctor's certification. The claimant appealed and the respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

This case involved a back injury that occurred on _____. After the claimant was examined by a doctor for the carrier, who assigned a 2% IR, a designated doctor was appointed. He examined the claimant and reviewed her medical records and objective testing, and ordered an additional MRI. After this, the designated doctor, noting that the claimant exhibited symptom magnification, assessed a 0% IR and certified that she reached MMI on February 7, 2000. He found that range of motion was invalidated. On May 12, 2000, the designated doctor answered some questions posed by the Commission, stating that her objective testing did not show conditions necessitating conservative treatment, let alone surgery (which he understood the treating doctor to be pursuing).

The claimant presented little medical evidence from around this time period, but a few months later her treating doctor recommended spinal surgery (his reports leading up to this or his recommendation are not in evidence). There is an April 2001 EMG report showing radiculopathy, primarily on the left side. The "second opinion process" was invoked by the carrier. One doctor disagreed with the surgical recommendation and found no evidence in the MRI studies from August 1999 and January 2000 of a herniated disc. He also reviewed discogram films and said they were completely normal. However, the claimant's second opinion doctor agreed with surgery, saying that the MRI (date not specifically identified) indicated degenerative disc and a small herniation. This doctor said that he did not see a decrease in disc space, and agreed that there was emotional overlay in the claimant's pain syndrome, but said that she "would benefit" from surgery. His report was dated June 14, 2000.

The claimant actually had surgery in September 2001; the record does not explain why over a year transpired between the second opinion doctor's concurrence and the actual surgery. She had repair surgery for the failed back surgery in May 2002. There was no dispute in this record of the designated doctor's original report. Nor was there any indication that the claimant sought to hold open the achievement of MMI for spinal surgery as set forth in Section 408.104. On April 30, 2002, the treating doctor

certified that the claimant had reached "statutory" MMI on June 26, 2001, with a 25% IR. Obviously, such IR was based upon an examination that took place between the claimant's back surgeries.

Asked to respond to the first additional surgery, the designated doctor reiterated the doctor's reports and objective testing he had reviewed ancillary to his examinations. He pointed out the lack of any objective evidence of impairment that would require an IR to be given under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). He pointed that the surgical condition noted after the first surgery (severe lateral stenosis) was nowhere evident in the objective testing that had been run prior to the recommendation for surgery. He said that her pain syndromes could have been treated psychologically without surgery.

This is a case where the medical evidence pertinent to this case makes it unique and not easily resolved under other cases with factual differences. While we do not necessarily agree with the hearing officer's application standard of "active consideration" of the surgery at the time of the designated doctor's examination, the majority herein cannot agree that the record in this case establishes that the great weight of contrary medical evidence outweighs the designated doctor's report. We do not depart from our cases where we have stated that a designated doctor may not decline to rate a condition because he does not agree with the need for spinal surgery that is approved through the second opinion process. *See* Texas Workers' Compensation Commission Appeal No. 000832, decided June 2, 2000; *also* Texas Workers' Compensation Commission Appeal No. 981633, decided August 28, 1998. We do note, however, that those cases involved spinal surgery performed prior to the achievement of statutory MMI, where the designated doctor was not supported in his contention that surgery was palliative or undertaken to correct preexisting conditions. We believe that the length of time that surgery occurs after statutory MMI has been reached may be considered by the hearing officer as a factor in whether the "great weight" of contrary medical evidence overcomes the designated doctor's report. The majority herein is not prepared to state that the occurrence of spinal surgery approved through the second opinion process at any point after statutory MMI in the "life" of a claim necessitates and compels reevaluation by the designated doctor.

We would note that even under Section 410.307, concerning consideration of substantial changes in condition by the court, such consideration is not automatic but must meet certain requirements to cause a change in the IR. It is also worth noting that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1(c)(3)(F) (Rule 130.1(c)(3)(F)) requires the designated doctor to consider additional information, but does not require him to use additional information not consistent with his clinical findings, so long as he explains why he is not using the additional information to revise his IR. Although a designated doctor's amendment in response to clarification may be given presumptive weight even taking into account poststatutory MMI surgery, under Rule 130.6(i), we cannot read that rule to compel a designated doctor to amend his report as a response to clarification.

Consequently, given the record here, we cannot agree that the hearing officer erred by finding that the designated doctor's report on MMI and IR was entitled to presumptive weight. We therefore affirm the decision and order.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION**
**350 NORTH ST. PAUL**
**DALLAS, TEXAS 75201**.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In the two cases cited by the majority, Appeal No. 000832, *Supra*, and Appeal No. 981633, *Supra*, we determined that a designated doctor failed to follow the protocol of the AMA Guides when he refused to assess any lumbar impairment based upon spinal surgery. That is exactly the situation in this case. The claimant had two spinal surgeries that were approved in the Commission's spinal surgery second opinion process and, as such, the claimant is entitled to a rating for those surgeries. In my opinion, it is of no moment that the surgeries occurred after the claimant reached statutory MMI. The significance of whether a surgery occurred before or after statutory MMI was something that the Appeals Panel created as part of the issue of whether an amendment was made within a reasonable time and for a proper purpose such that the amended report of a designated doctor would be given presumptive weight. However, in Texas Workers' Compensation Commission Appeal No. 013042-s, decided February 4, 2002, we held that the amended version of Rule

130.6(i), “does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time.” In this instance, the designated doctor simply did not properly apply the AMA Guides, as is required in Section 408.124, in assessing a 0% impairment rating to the claimant. Thus, in my opinion, his report is not entitled to presumptive weight.

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Elaine M. Chaney
Appeals Judge